UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	*	
	*	
GORDON PROPERTIES, LLC,	*	**Case No. 09-18086-RGM**
CONDOMINIUM SERVICES, INC.,	*	Chapter 11
	*	(Jointly Administered)
Debtors.	*	
GORDON PROPERTIES, LLC,	*	
CONDOMINIUM SERVICES, INC.,	*	
	*	
Debtors,	*	
	*	
v.	*	**Contested Matter**
	*	(Motion to Approve Settlement,
FIRST OWNERS' ASSOCIATION OF	*	Docket No. 498)
OF FORTY SIX HUNDRED	*	
CONDOMINIUM, INC.,	*	
	*	
Creditor.	*	

JOINT OBJECTIONS TO EXAMINER'S REPORT

I. INTRODUCTION

The Court appointed Stephen E. Leach as an Examiner ("the Examiner") to investigate "all issues reasonably related to the Settlement Agreement between and among Gordon Properties, LLC; Condominium Services, Ind.; Gordon Residential Holdings, LLC; and First Owners' Association of Forty Six Hundred Condominium ("FOA")." [Docket No. 608]

The Examiner has now submitted his report ("the Report") [Docket No. 648], which concludes that FOA failed to observe proper corporate formalities in negotiating and approving the Settlement Agreement.

Both the debtors and FOA disagree with the Examiner's conclusions and jointly file these objections to his Report (with the exception of Part V, which is the objection solely of the debtors and as to which FOA does not join).

II. FOA'S BOARD, INCLUDING A MAJORITY OF ITS DISINTERESTED MEMBERS, RATIFIED THE SETTLEMENT AGREEMENT, AS RECOMMENDED BY THE EXAMINER

The essence of the Examiner's Report is that FOA failed to observe proper corporate formalities in the negotiation and approval of the Settlement Agreement. The Report devotes 29 pages to the alleged governance missteps. Nonetheless, the Examiner concludes by stating:

> **Notwithstanding its problematic genesis described above, the Examiner is aware of no provision of the Virginia Nonstock Corporation Act or the By-Laws that would bar ratification of the Settlement Agreement, or a revised version thereof, by a majority of the disinterested directors of the Board. Thus, while there are certain problematic provisions of the Settlement Agreement, discussed below, the issues of fairness to the FOA and the actions of interested directors would be substantially resolved if a majority of the disinterested directors of the Board approved the Settlement Agreement or a modified version thereof.**

Report at 31.

However, the Examiner failed to recognize that a majority of disinterested members of FOA's Board did, ***in fact***, vote to ratify the Settlement Agreement, thereby having "resolved" (in the words of the Examiner) the very concerns he discussed in the preceding 29 pages. The Examiner makes no mention in his Report of the January 15, 2013 FOA Board meeting at which a majority of the disinterested directors voted to "**ratify and accept the Settlement Agreement between Gordon Properties LLC and FOA dated December 2012.**"[1] This vote occurred at a properly conducted meeting of the Board of Directors at which all Board members, other than Ms. Hadley,[2] were present. *Id.* at 1. The vote was recorded in the minutes as "Bill Reichenbach voted Yes; Martina Hernandez voted Yes; Jonathan Halls, Elizabeth Greenwell, Bryan Sells, and Lindsay Wilson abstained." *Id.* at 8. Thus, the vote was two in favor, none against, and four

[1] Exhibit 1, January 15, 2013 Board of Directors Approved Meeting Minutes, page 8.
[2] Ms. Hadley's absence from the January 15 meeting was of no consequence to the vote because she had a direct financial interest in the Settlement Agreement, and, thus, was not disinterested. Ms. Hadley's financial interest is discussed *infra*, at Part III.

abstentions.[3] The minutes of the January 15 meeting were approved on February 19, 2013.[4] The disinterested members of the Board with respect to the vote on the Settlement Agreement are Mr. Reichenbach, Ms. Hernandez, and Mr. Halls. The vote of these disinterested Board members was two in favor and one abstention. Accordingly, a majority of the disinterested Board members approved the Settlement Agreement.

Although the Examiner represented that he had reviewed all FOA Board Minutes "through June 2013" (Report at 5), he failed to bring this vote of ratification to the attention of the Court. Further, he failed to attach the minutes of this decisive vote in his lengthy Appendices. Nonetheless, there is no question that he was in possession of the minutes and was aware of the ratification vote before publishing his Report. FOA's counsel delivered the minutes of this meeting to the Examiner. Moreover, the January 15 motion to approve the Settlement Agreement was discussed specifically during the Examiner's interview with one of the members of the SLC (Mr. Halls). In addition, the fact of this vote was specifically referenced in Gordon Properties' Amicus Memorandum [Docket No. 576], at pages 7 and 8, where Gordon Properties represented to the Court that it was prepared to produce evidence that the FOA Board had ratified the Settlement Agreement and that the vote of the disinterested members was in favor of the Settlement Agreement.[5]

Because the debtors and FOA believe the January 15 vote is the most relevant evidence of FOA's compliance with applicable corporate governance obligations in approving the Settlement Agreement, and because the vote should have been dispositive as to the Examiner's

[3] The Examiner erroneously notes in his Supplemental Report (see *infra*, Part II) that the minutes of the January 15 meeting are inconsistent in that they report the vote as three in favor and none opposed, whereas the actual vote was two in favor and one abstention. It appears that the Examiner may have relied upon a "Draft" of the minutes, whereas the "Approved" minutes of that meeting correctly record the vote (see Exhibit 1).
[4] Exhibit 2, Board of Directors Meeting, February 19, 2013.
[5] Gordon Properties mistakenly reported in its Memorandum that the vote was 6-0, not recollecting that the Gordon Properties-related board members and Mr. Halls abstained, such that the vote of the disinterested Board members was 2 in favor, 1 abstaining.

analyses and conclusions in that regard (such a vote was his recommendation to resolve his corporate governance concerns), counsel for the parties were puzzled why the Examiner failed to mention it in his Report and decided to jointly contact the Examiner to inquire as to why it was not discussed in his Report. In a joint conference call, the Examiner stated that he had no recollection of the January 15 vote, but he agreed to review his files and report back. Following his review, the Examiner sent an email to counsel acknowledging that he simply overlooked the January 15 meeting in preparing his Report. Nonetheless, the parties believe that if the Examiner had simply raised his concern over the need for a vote of ratification with the parties before preparing his Report, that concern could have been resolved by reminding him of the January 15 meeting.

Given this vote of ratification evidenced by these corporate documents, the Examiner's recommendation that "***the Bankruptcy Court withhold approval of the Settlement Agreement unless the Settlement Agreement, in its present or a modified form, is ratified by a majority of the disinterested members of the Board***" (Report at 2) has, in fact, already been satisfied. Accordingly, because all corporate formalities were satisfied by virtue of the vote of ratification as recommended by the Examiner, the Court should approve the Settlement Agreement.

III. THE EXAMINER'S SUPPLEMENTAL REPORT

After being notified by counsel for the debtors and FOA that he failed to discuss the January 15 ratification vote, the Examiner filed a Supplemental Report [Docket No. 656] ("Supplemental Report"). After acknowledging his omission of the January 15 vote of ratification from his Report, the Examiner then proceeds to attack the legitimacy of the vote based upon facts and conclusions that simply are incorrect.

(a) Lucia Hadley is not disinterested. Similar to his conclusion as to the Board's vote to ratify creation of the SLC,[6] the Examiner concludes in his Supplemental Report that the January 15 vote to ratify the Settlement Agreement was ineffective based upon his conclusion that Ms. Hadley was disinterested. Because Ms. Hadley was absent from the meeting, the Examiner concludes that less than a majority of disinterested Board members approved the Settlement Agreement. However, the Examiner is in error in this regard. Ms. Hadley is not, in fact, disinterested. Thus, her absence from the meeting was of no consequence.

Virginia Code § 13.1-803 defines "Disinterested director" as "a director who, at the time action is to be taken under § 13.1-871. . . does not have (i) a financial interest in a matter that is the subject of such action . . . which would reasonably be expected to affect adversely the objectivity of the director when participating in the action . . . ." At the time of the January 15 meeting and ratification vote, Ms. Hadley had a financial interest in the Settlement Agreement. Not only did the Settlement Agreement specifically carve out certain claims against her personally,[7] Ms. Hadley also was a named defendant in two separate lawsuits involving the subject matter of the settlement – the first by Gordon Properties for the same improper conduct that resulted in the sanctions and damage award against FOA which are the subject of the Settlement Agreement,[8] and the second by FOA for breach of fiduciary duty for having participated in the unlawful scheme that led to its obligation to pay the sanctions and damage award. Ms. Hadley participated in the conduct that violated the automatic stay, leading to the sanctions and damage award against FOA, and leading to the breach of fiduciary claims against her by both Gordon Properties and FOA. Moreover, the Settlement Agreement that Ms. Hadley

[6] See, *infra*, part IV(a).
[7] See Report Appendix 4, Exhibit 30.
[8] Although this law suit was non-suited prior to the January 15 Board meeting, the cause of action was still alive on January 15 because the period for re-filing had not yet expired. See Report Appendix 1, Exhibit 7 and Report Appendix 2, Exhibit 9.

was being asked to vote upon would end the appeal of that judgment, thereby preserving the claims against her by both Gordon Properties and FOA.

Throughout his Report, and again in his Supplemental Report, the Examiner affirmatively states his conclusion that Ms. Hadley was disinterested, yet he does not engage in any analysis whatsoever of the facts or the law to determine whether she was disinterested. Even after admitting in footnote 47 of the Report that Ms. Hadley is adverse to Gordon Properties, the Examiner concludes, with no analysis or explanation, that being adverse to the party whose Settlement Agreement she is being asked to approve does not make her interested. Even more troubling is the Examiner's stated concern that the Settlement Agreement does not resolve the litigation against Ms. Hadley, citing specifically to the carve-out of the claim against her.[9] If the carve-out of the claim against Ms. Hadley renders the Settlement Agreement "unfair," how can her vote on approval not be an interested vote? The Examiner fails to see the logical inconsistency between this apparent "problem" and his conclusion that Ms. Hadley is disinterested. The Examiner's conclusion that Ms. Hadley is disinterested clearly cannot be supported.

Ms. Hadley had a direct financial interest in any settlement that might be reached on these cases. She is every bit as financially interested as is Mr. Sells. The vote to approve the Settlement Agreement was a vote whether or not the litigation against her would be pursued. As such, she cannot be considered a disinterested director.[10]

[9] See Report, at 36-38.

[10] That Ms. Hadley was not disinterested is not a new suggestion. To the contrary, Gordon Properties has on many occasions raised her interested status in filings with this Court. See, e.g., Gordon Properties' *Amicus* Memorandum [Docket No. 576]. Moreover, that she was not disinterested was a factor in why the Board did not appoint her to the SLC in the first instance.

(b) Voting requirements for disinterested board members. In his Report, the Examiner acknowledges that the voting requirement for disinterested directors is debatable.[11] In his Supplemental Report, however, he simply adopts the stricter standard, that is, that a majority of all disinterested Board members must vote, rather than a majority of those present and voting. The reason is simple – the vote to ratify the Settlement Agreement is valid regardless of Ms. Hadley's interest if the applicable standard is a majority of disinterested directors present and voting. The Examiner does not explain his selection of the stricter standard, when the statute could be read to require only the majority of the disinterested members voting. Thus, his assertion that the vote is defective is again based solely on his unexplained conclusion that Ms. Hadley is a disinterested party. As discussed earlier, there simply cannot be any reasonable debate about whether Ms. Hadley had a financial interest in the vote to ratify the Settlement Agreement on January 15, 2013.

(c) Other "problematic, albeit non-dispositive circumstances". The Supplemental Report also raises "problematic, albeit non-dispositive circumstances" relating to the vote of ratification. First, the Examiner skirts the fact that the Board actually satisfied his recommendation that the Board simply ratify approval of the Settlement Agreement by suggesting that the January 15 vote was not a considered vote. Second, the Examiner determines that there was no prior notice that the Settlement Agreement would be discussed at the meeting. And, finally, the Examiner determines that the Settlement Agreement may not have been distributed to the members prior to the meeting (based upon a statement by Mr. Halls during his interview that he did not recall receiving a copy), and concludes that "a vote on something as important as approval of the Settlement Agreement would have been inappropriate before all disinterested directors had

[11] In footnote 51 of his Report, the Examiner acknowledges that whether the standard is a majority of all disinterested directors or a majority of the disinterested directors present and voting is unclear.

carefully reviewed the document itself." Thus, despite the Board doing exactly what the Examiner had previously recommended in the Report (i.e., ratify the approval), the Examiner finds that the decision was qualitatively deficient. The Examiner is wrong on all these points.

In his rush to file his Supplemental Report explaining his omission of the January 15 vote, the Examiner commits another omission by failing to review the entire Board meeting packet for the January 15 meeting.[12] Had he done so, he would have discovered that approval of the Settlement Agreement was, in fact, noted as an agenda item on the published agenda, and he would have discovered that a copy of the Settlement Agreement was, in fact, included in the Board packet and delivered to all Board members prior to the meeting. Thus, although not required by FOA's bylaws or by the Virginia statute,[13] the Board of Directors was provided with an agenda and materials in advance of the meeting.[14] On January 11, 2013, by email to all board of directors, an agenda and accompanying materials for consideration at the regularly scheduled meeting were simultaneously delivered to all directors.[15] The agenda for the Executive Session appears on page 51 of the board package, and the Settlement Agreement appears at page 75.

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[12] The Examiner also erroneously reports that the minutes of the meeting incorrectly report the vote taken at the January 15 meeting. It appears that the Examiner may have been looking at a "Draft" of the minutes rather than the actual "Approved" minutes which correctly record the vote.

[13] Virginia Code §13.1-866 provides that "[u]nless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting." Thus, the Virginia Code does not require any notice, either regarding the timing, or the substance of any board of directors meetings. The sole requirement of any such notice would be contained in the FOA bylaws. The FOA bylaws (Report Appendix 4, page 35 [Docket No. 649] require notice only of the time and place for regular meetings. Finally, the bylaws further provide, in Article V, Section 13, that "attendance by a Director at any meeting of the Board of Directors shall be a waiver of notice by him of the time, place and purpose thereof.

By previous agreement of the Board, FOA set its regularly scheduled meetings to occur on the third Tuesday of each month. The January 15, 2013 meeting was one of those regularly scheduled meetings. All directors, except for Ms. Hadley, were present at the meeting according to the minutes and thus all those directors waived any issue with respect to the sufficiency of the notice of the meeting. Any business conducted at the meeting thus constitutes valid action of the association.

[14] It should also be pointed out that FOA's counsel conducted a "Town Hall" meeting on January 10, 2013, upon notice to all unit owners, including Board members, at which the Settlement Agreement was discussed and copies were made available to everyone.

[15] Exhibit 3 is the email transmission to all Board members. Exhibit 4 is an excerpt of the 93 page board package that accompanied the email, including page 1, the Agenda, page 51, the Executive Session Agenda [redacted] and pages 75-76, a copy of the Settlement Agreement. The full meeting package will be presented as an exhibit during the 9019 hearing.

Thus, all directors had advance notice that the Settlement Agreement was on the agenda, and all directors had been provided with a copy for their review. The Examiner's suggestion that the vote of ratification is somehow tainted because the board members had not seen the Settlement Agreement is wrong.

Moreover, at its next regularly scheduled meeting, the board approved the minutes of the January 15, 2013 meeting "without objection."[16] Had there been some impropriety in the vote to ratify the Settlement Agreement, or had any of the directors wished to voice a concern regarding the process or the substance of the vote, any of the directors could have done so. None did. The Examiner's reliance on the memory of one board member, contrary to the written evidence, is unsupportable.

All directors had notice of the agenda item and a copy of the Settlement Agreement prior to the January 15 meeting and should have governed their conduct at the meeting accordingly. The Supplemental Report's concern that "[g]iven the importance of the Settlement Agreement to the FOA, advance notice of the Ratification Motion, through its inclusion on the Agenda, was material" (Supplemental Report at 4), was satisfied. FOA has already satisfied the very concerns raised in the Report and in the Supplemental Report. Having satisfied the Examiner's articulated concerns in the Report and the Supplemental Report, the Settlement Agreement should be approved.

IV. OTHER OBJECTIONS TO THE REPORT

Although the vote of ratification by the disinterested Board members resolves the Examiner's governance concerns, there are several other misstated facts and conclusions that color the Examiner's Report and compel response.

[16] *See* Exhibit 2.

(a) The Creation, Ratification, and Authority of the SLC. The Examiner goes to great lengths to report on perceived corporate irregularities relating to the creation of the SLC at the organizational meeting conducted by the newly-elected Board following FOA's October 3, 2012 election. These alleged irregularities are the vote of disinterested directors,[17] composition of the committee, and overbroad delegation.

Recognizing the scrutiny that its actions face in this case, the FOA Board and its disinterested members voted twice to ratify creation of the SLC at the Board's organizational meeting following FOA's October 3, 2012 elections. First, the Board ratified the creation of the SLC at its first regularly scheduled meeting that followed the organizational meeting on October 16, 2013,[18] and the Board again ratified creation of the SLC at its regularly scheduled meeting on April 16, 2013.[19] All Board members were present at both meetings. The vote by the disinterested members in favor of ratification at the October 16 meeting was 2-1 (total vote 5-2), and the vote by the disinterested members if favor of ratification at the April 16 meeting was 3-0 (total vote 7-0). Accordingly, a majority of disinterested Board members voted affirmatively to ratify the October 3, 2012 creation of the SLC.[20]

The Examiner, after challenging the actions in creating this committee, and analyzing the voting and constitution of the committee, acknowledges this ratification in his footnote 55. Nonetheless, while the Examiner thus concedes the appropriateness of the vote (all disinterested members voting in favor of the SLC), he takes issue with the composition of the committee and

[17] Lucia Hadley's financial interest is discussed earlier in this objection and will not be repeated here.
[18] Exhibit 5, October 16, 2012 Board of Directors Approved Meeting Minutes, page 9.
[19] Report Appendix 4, Exhibit 22, page 5, Board of Directors Meeting Minutes, April 16, 2013.
[20] As previously set forth in the Amicus Memorandum, at pages 8-9, the April 16 vote was a reaction to the *Sobol* Complaint that took issue with the establishment of the SLC at the organizational meeting. In an abundance of caution, the FOA Board was simply removing any litigation issue with respect to the creation of this SLC at the organizational meeting by having the entire Board ratify its creation, thereby eliminating any claim that the committee had not been properly created. In retrospect, given the vote of the Board to ratify approval of the Settlement Agreement, the vote to ratify creation of the SLC probably was unnecessary in any event.

the delegation to it of settlement authority. While both of these issues are moot given the ratification of the Settlement Agreement by the disinterested Board members at the January 15 meeting, the parties object to the Examiner's conclusions regarding those issues.

The Virginia Nonstock Corporation Act authorizes a board of directors to establish committees to assist in the business of the board. A board can establish board committees and "non-board" committees to assist it. GOOLSBY ON VIRGINIA CORPORATIONS, § 9.6. While a board committee must have a minimum of two board members, pursuant to Virginia Code §13.1-869, there is no prohibition against including "non-board" persons to assist the committee in its endeavors. The Examiner does not refer the Court to *any* authority that a non-board person invalidates a committee of at least two board members, particularly when all board members on the committee vote unanimously in support of the committee's action. Regardless of whether appointment of a non-board member to the SLC was appropriate, the remaining two board members could properly exercise the functions of the committee. Indeed, it is common for board committees to seek the assistance of accountants, attorneys, and, in the case of condominium associations, the property manager, who are integral parts of the committee's effort. Thus, the inclusion of an additional person to assist the two properly appointed board directors is not fatal to the composition of the SLC.

The final challenge the Examiner cites to discredit the SLC is an "overly broad" delegation of authority. However, the Virginia statute empowers a board to grant extremely broad authority to committees, so long as certain enumerated powers are not delegated. Virginia Code § 13.1-869D. None of the prohibited acts set forth in this statute were delegated to the SLC. The committee was delegated the authority to negotiate and approve a settlement, and to engage counsel to assist it in that function. The terms of the delegation were acts the Board

could take on its own behalf. Accordingly, extending this authority to the committee could not be inappropriate. While the Examiner again fails to provide the Court *any* authority to support his allegations that the SLC is defective because of an overly broad delegation, the statute does not prohibit the delegation in this case. In fact, special committees have become "the norm" in recent years to address litigation concerns and allegations of misconduct of officers. *See*, GOOLSBY ON VIRGINIA CORPORATIONS, § 9.6. *See also e.g., Abella v. Universal Leaf Tobacco Co., Inc.*, 546 F. Supp. 795 (E.D. Va. 1982) (addressing the use of special committees in shareholder derivative litigation). In the instant case, given a divided board with members on both sides of this highly contested litigation, the use of a special committee, with the power to settle, is entirely appropriate.[21]

Thus, while the Settlement Agreement was, in fact, approved by the disinterested members of the Board, the Board also properly observed the corporate requirements of Virginia law in creating and ratifying the creation of the SLC.

(b) The termination of Reed Smith. The Examiner makes much of the fact that Reed Smith was terminated and that the SLC was not free to reengage Reed Smith. The Examiner's view that this action is "unfair" permeates the Report. However, this view fails to recognize the damage caused by these attorneys to FOA, and fails to recognize that a decision by the Board to continue the engagement would have been "imprudent to the point of irresponsibility."

[21] The Examiner's Report repeatedly refers to a "First" SLC and a "Second" SLC. In fact, these SLCs were neither the first nor the second SLCs. FOA has a long history of appointing litigation committees to assist the Board, as is customary in many owners' associations. More importantly, unlike the committees appointed since the 2011 election supervised by this Court, FOA's prior litigation committees were created without any written definition of their role or scope of authority and without any limitations upon such authority. It was not until creation of the committee following the 2011 election that the Board, led by President Sells, put in writing the scope of authority and limitations upon such authority.

The Examiner neither mentions nor attaches to his appendix this Court's opinions of June 2, 2010[22] and September 20, 2011.[23] The 2011 opinion sets out the factual predicate for the Court's imposition of sanctions against FOA for actions taken by the Board upon oral and written advice and opinions of its counsel, Reed Smith. In the 2011 Opinion, the Court found that FOA had violated the automatic stay and held it in contempt of court, imposing a sanction of $100,000.00. The Court's opinion is replete with language that the Board and its counsel "played for time," acted on "mere subterfuge," and made arguments as a "ruse."[24] The Court found "Counsel's opinion" "without meaningful analysis."[25] Ultimately, Gordon Properties was awarded damages against FOA in the hundreds of thousands of dollars, including attorneys' fees, for FOA's intentional violation of the automatic stay [Judgment Order, Docket No. 225, A/P 11-1020-RGM].

The advice provided to the Board by its attorneys resulted in significant costs to FOA, caused the Board to be held in contempt of court, and caused a judgment to be entered against FOA for a minimum of $277,000. Arguably, this advice gave rise to a malpractice claim against those attorneys.[26] Consequently, it was entirely appropriate, if not mandated, that the Board elect to terminate the services of those attorneys. Far from being "unfair" or "potentially damaging to the litigation interests of FOA," the termination was a natural result of the Court's ruling that its attorneys provided unreliable legal advice. Not only was termination a reasonable business decision by the Board, failure of the Board to do so and to continue employment of these

[22] Exhibit 6, Memorandum Opinion of June 2, 2010.
[23] Exhibit 7, Memorandum Opinion of September 20, 2011.
[24] Exhibit 7, pages 25, 24, 26
[25] *Id*., page 22.
[26] It is apparent, to these parties at least, that Reed Smith is fully aware of its exposure. The Court is reminded of Reed Smith's misrepresentations to both this Court and the District Court regarding its fee arrangement with the plaintiffs in the *Sobol* litigation. Although Reed Smith represented that it was representing these plaintiffs *pro bono*, it was later discovered that its fee agreement with these plaintiffs actually allowed them to recover their fees from FOA under the fee-shifting statute contained in the Virginia Condominium Act.

attorneys could have exposed the Board members to a breach of fiduciary duty claim by the unit owners. For these reasons, the Examiner's repeated objection to the decision to terminate the law firm's services and prohibit the SLC from engaging the law firm is simply unfounded.

V. EXAMINER'S "PROBLEMATIC" ISSUES WITH THE SETTLEMENT AGREEMENT[27]

Finally, the Examiner addresses six specific concerns about the substance of the Settlement Agreement.[28] But the Examiner misses completely the reasons why these "problematic" provisions are contained in the Settlement Agreement, and he fails to recognize that many of these provisions are included for the benefit of both parties, not simply for the benefit of Gordon Properties. Although the Examiner's "problematic" concerns will be addressed in more detail at the 9019 hearing, a brief response as to each of these concerns is contained below.

As a threshold, it cannot be overstated that the intent of each of these provisions is to bring finality to the disputes between the parties. Each of these provisions is critical to achieving that finality – in the absence of any of these provisions, further litigation is invited. In addition, there are separate reasons why each provision is a reasonable and appropriate part of the Settlement Agreement, and those are addressed below.

[27] Although FOA joins with the debtors in Parts I through IV of this Objection, FOA does not join in this Part V, which are objections solely of the debtors. Nonetheless, FOA reconfirms its agreement as to all provisions of the Settlement Agreement and requests that the Court approve the Settlement Agreement without modification.

[28] The debtors believe that the Supplemental Order Directing the Appointment of An Examiner dated June 4, 2013 did not direct the Examiner to look into the merits or substance of the Settlement Agreement. That is a matter for the Court and is the purpose of the 9019 hearing scheduled for August 23, 2013. Moreover, the debtors are concerned that the Examiner has resorted in this portion of his Report, and in his Supplemental Report, to litigation advocacy which clearly goes beyond the role of an Examiner.

(a) Vacating the Court's order regarding board qualifications.

The provision to vacate the Court's order regarding the number of board members that can be seated by a non-natural unit owner is intended to benefit all similarly situated unit owners, not simply Gordon Properties. More importantly, it is a critical part of achieving finality.[29]

Unit owners should be permitted, in a democratic environment, to elect whoever they wish to their board of directors, provided the individual otherwise qualifies as a director under the condominium documents. For this reason, FOA's Board should have no position on the underlying legal issue – the dispute, if any, should be solely between the winning candidate and the losing candidate (see, below – the right of a unit owner to contest who sits on the Board is reserved to every unit owner under the Settlement Agreement).

This order will chill investment in this condominium and will have a negative impact upon the market value of every unit. Investors wishing to purchase units, and possibly improve and develop the property, will be chilled by a provision that limits them to a single seat on the board.

While leaving this order in place will bind Gordon Properties forever, vacating the order will enable all unit owners to elect how to respond to this issue in the future should they wish. This provision of the Settlement Agreement preserves to every unit owner the right to contest the issue as to any future election (and does not effect a change in the composition of the present Board). Gordon Properties recognizes, of course, that a court in which such an action is brought could very well rule similarly to this Court's ruling. Nonetheless, Gordon Properties, and every other unit owner, should have a right to resolve this question in the future. To allow the Court's

[29] Gordon Properties was prepared to proceed with a settlement that "carved out" the Court's order regarding board qualifications, thereby allowing that issue to proceed on appeal. Because FOA insisted upon a global settlement with finality, Gordon Properties elected to require vacatur of the order rather than carving the issue out to continue the appeal.

ruling to stand without allowing Gordon Properties its right of appeal would be highly prejudicial to Gordon Properties, as well as other similarly situated unit owners who might be bound by the order.

There appears little question that Rule 60(b) of the Federal Rules of Civil Procedure (incorporated by Bankruptcy Rule 9024) "may be utilized to seek vacation of a judgment on the ground that the case has been settled." Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 2863. The Examiner refers this Court to cases denying vacatur where the factual situation is entirely different from the proposed settlement sought in this case. *Valero Terrestrial Crop. v. Paige*, 211 F.3d 112 (4th Cir 2000), specifically found that *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (also cited by the Examiner) only decided the question "whether *appellate* courts in the federal system should vacate civil judgments of *subordinate* courts" and then only in the "context of cases that are *settled* after appeal is filed or certiorari sought." 211 F.3d at 117 (emphasis in original). That is not what is being sought in this case. And in *Neumann v. Prudential Ins. Co. of America*, 398 F.Supp.2d 489, 492 (E.D. Va. 2005), the District Court was confronted with a simple settlement that involved a single claim (denial of long term disability benefits to plaintiff) in a single case that one of the parties lost and then settled post judgment. In this case, on the other hand, the Court is confronted with a myriad of cases and claims which are addressed in the Settlement Agreement. This is not a simple matter where the parties waited for a result and then are "trying to bargain away any adverse decision with a settlement conditioned on vacatur" *id*. at 493, or where the prior order is moot because of the actions of the parties, and thus the scrutiny and strictures of that case are inapposite. The vacatur in this case is but a piece of the settlement which involves multiple cases and claims and resulted in on-going multi-year litigation. Vacatur conserves further judicial

resources and promotes finality in these matters. It promotes the public interest by permitting future unit owners to continue to govern their own conduct. These are all reasons why this Court should exercise its discretion to permit vacatur of one order as part of an overall settlement of multiple claims and issues. *Id*. at 492 (vacatur is committed to the sound discretion of the court).

For these reasons, vacating the order has been made a condition to the settlement, rather than carving this issue out of the settlement and avoiding finality.

(b) The restaurant unit assessment.

The Examiner acknowledges that a "cap" may be justified as a term in a settlement agreement, but apparently fails to see the justification in this case.

As a threshold, it is important to recognize that a primary purpose of this Settlement Agreement is to prevent improper targeting of assessments against a single unit owner, something that this association had a history of engaging in against Gordon Properties. This provision (as well as paragraph 10—see part (e) of Examiner's Report) is intended, and recognized by both parties, as a reasonable vehicle to prevent such actions. The cap does not prevent the association from making an assessment against the restaurant unit. Rather, paragraph 10 of the Settlement Agreement establishes the criteria for proper assessments – assessments are permitted if made in compliance with applicable law (something this association failed to honor in prior years). It should be apparent that withholding consent when a proposed assessment is made in accordance with the Settlement Agreement and applicable law would not be reasonable.

The evidence is clear that prior unconstrained boards engaged in improper assessment methods to extract money from the owner of the restaurant unit. The constraints on assessment of the restaurant unit are designed specifically to avoid revisiting that history.

Finally, this Court is aware of the significant negative impact on market value of the restaurant unit caused by the prior Board's assessment methodology and the uncertainty of assessment methodology in the future. If the protection negotiated by Gordon Properties in this Settlement Agreement does not inure to the benefit of a subsequent owner, the value of the Settlement Agreement is illusory.

(c) Special charges.

The Examiner reports that his concern with respect to the cap on special charges is the same as his concern with respect to assessment of the restaurant unit. The response of the parties also is largely the same.

The evidence at the claim objection hearing established that FOA's prior board had targeted Gordon Properties with discriminatory and unreasonable user fees, assessments, and other charges. There simply was no factual or legal basis for the discrimination. This provision of the Settlement Agreement is designed to prevent such abuse in the future.

Nothing in this provision prevents FOA from making an assessment that is in compliance with the Settlement Agreement and applicable law (i.e., paragraph 10). Rather, this section is intended to prevent the association from imposing such fees and charges other than in accordance with paragraph 10. Consequently, this provision actually allows the association to assess an **improper** charge against Gordon Properties, provided that it does not exceed $200.

(d) The "carve-out" of claims against FOA's former board members.

The Settlement Agreement is an agreement between the debtors and FOA. It establishes finality and resolves **all** litigation between those parties. The "carve-out" does not apply to any claims against FOA – rather, it applies to persons other than FOA. Those persons are not before this Court and were not participants in the settlement negotiations. It is not reasonable to require

FOA to pay more in this settlement in order to "buy" the release of these individuals. These individuals engaged in willful misconduct as to which they are not entitled to indemnification from the association. Consequently, it was incumbent upon FOA to "carve out" these claims in order to minimize the amount it would be required to pay to induce a settlement by the debtors. Nonetheless, the debtors would entertain negotiating a settlement with these individuals and include them in the Settlement Agreement if this Court is able to bring them to the settlement table.

(e) The agreement to use the 2013 budget as a template.

The Examiner has taken a single sentence from paragraph 10 out of context and expresses concern where there should be none. The language in paragraph 10 that precedes the sentence that offends the Examiner contains the operative language governing assessment methodology in the future. The sentence quoted by the Examiner simply confirms the agreement of the parties that the "template" created for the 2013 budget is a proper "template" for complying with the assessment requirements. This "template," for the first time in FOA's history, contains the proper categories of expenses for assessment purposes as defined by Judge Kemler (and, of course, this Court and other applicable law). There is nothing in the Settlement Agreement that suggests that the "numbers" contained in the "template" will not change – of course they will. But the association's expenses must be properly allocated to the appropriate category, as set forth in the approved "template," in order to comply with applicable law.

(f) Requirement that FOA vote for Gordon Properties' plan.

A provision in a settlement agreement negotiated in good faith that a party support the debtor's plan of reorganization is customary and permissible and has been upheld in many cases. The Examiner misrepresents the holding in the sole case he relies upon, *In re Indianapolis*

Downs, LLC, 486 B.R. 286 (Bkrtcy., D. Del. 2013). Not only does *Indianapolis Downs* **not** stand for the proposition for which the Examiner cites it, the holding actually supports the provision contained in the Settlement Agreement (the court's holding actually approved the agreement at issue in that case). In short, the Delaware bankruptcy court rejected the creditor's contention, identical to the Examiner's contention, that a post-petition, pre-disclosure settlement agreement to vote in favor of the debtor's plan violated section 1125's prohibition against pre-disclosure solicitation. Rather, the court agreed with and cited Third Circuit authority for the proposition that the prohibition against pre-disclosure solicitation must be read very narrowly in order not to chill settlement negotiations in a chapter 11 case.

The parties reserve the right through evidence and further argument at the 9019 hearing to supplement this portion of the response in support of the Settlement Agreement.

For the foregoing reasons, the parties respectfully request that the Court approve the Settlement Agreement.

Respectfully submitted,

GORDON PROPERTIES, LLC,
CONDOMINIUM SERVICES, INC.

and

FIRST OWNERS' ASSOCIATION OF FORTY SIX HUNDRED CONDOMINIUM, INC.

By counsel

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Certificate of Service

The undersigned certifies that this response was served electronically on August 19, 2013 upon all parties in interest pursuant to this Court's CM/ECF procedures.

/s/ *Donald F. King*
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